IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH: NAGPUR

CRIMINAL APPLICATION NO.2294 OF 2006

Pradeep Sakharam Raut

versus

State of Maharashtra

Mr. S. V. Sirpurkar, Advocate for applicant.

Mr. Ahirkar, A. P.P. for state.

CORAM:S.R.DONGAONKAR, J.

DATE:23/11/2006.

ORDER

Heard Shri Sirpurkar, Advocate for applicant and Shri Ahirkar, A. P.P. for state.

Admit.

Heard finally with the consent of the parties.

This is an application under section 482 of Criminal Procedure Code, in which the applicant is seeking the relief of directing "change of Public Prosecutor" in Sessions Case No.20/2002 pending on the file of 3rd Adhoc Additional Sessions Judge, Chandrpur, on the ground that he is related to one of the prosecution witnesses and had counselled in the matrimonial dispute of the deceased and the accused has interest in the prosecution.

2] Facts giving rise to this application, which are necessary for the disposal of this matter may be stated thus. The applicant is facing trial in Sessions Trial No. 20/2002 before the Court of Ad-hoc Additional Sessions Judge, Chandrapur. It is a case for the offence punishable under section 306 of I.P.C. The said case is fixed for evidence. Four witnesses have been already examined. The case at the time of filing of the application was fixed for recording the evidence of other witnesses. It is claimed that earlier A. P.P. Shri Munghate was appearing on the side of the prosecution in this case. However, after some evidence was recorded, the present Public Prosecutor Shri Ambatkar took charge of the said case as prosecutor [He being Government Pleader and Public Prosecutor Chandrapur]. It is alleged that Shri Ambatkar and the complainant as well as some of the prosecution witnesses are known to Shri Ambatkar, in fact, one of them is relative of him. When the matrimonial dispute was going on between the deceased and the accused; Shri Ambatkar had councelled the parties. It is contended that Shri Ambatkar P.P. is having extra interest in the litigation and prosecution of the accused and therefore, the applicant apprehends that he would not get fair justice at his hands as Public Prosecutor Shri

Ambatkar would not be acting in fair manner. According to the applicant, he has preferred an application asking the court directing the Public Prosecutor to recuse himself from the matter and directing the said matter to be conducted by another Public Prosecutor.

3] This application he had filed as per Exhibit 52. In the application he has specifically contended that earlier; Shri Munghate A.P.P. was conducting the case, now Shri Ambatkar has taken charge of the said case. he has relation with complainant so also he knows the witnesses of the prosecution very well and therefore, he apprehends that he would not get fair justice in the matter. Therefore, he claimed that another Public Prosecutor should be directed to conduct the matter. He specifically mentioned in the application that understanding was given to his wife at the house of Makde Madam by Shri Ambatkar.

4] On this application, Shri Ambatkar / Public Prosecutor objection was raised, saying that all the contentions levelled against him are highly objectionable and false.

5] Learned Trial Judge heard both the sides and rejected that application, saying in short that the accused

is not entitled to ask for change of the Public Prosecutor. He has also observed that the Public Prosecutor may know many of the witnesses and that fact by itself will not be sufficient to ask the Public Prosecutor to recuse himself from the matter. This order is challenged in the present application.

6] I have heard the learned counsel for the parties at length.

7] Learned counsel for the applicant, relying on the decision of the Apex Court in (2004)3 SCC 767 [K. Anbazhagan ..vs.. Superintendent of Police and others], (2004)4 SCC 158 [Zahira Habibulla H. Sheikh and another ..vs.. State of Gujrat and others], 1987(1) SCC 288 [Sheonandan Paswan ..vs.. State of Bihar and others] and (200)8 SCC 570 [Dinesh Dutt Joshi ..vs.. State of Rajasthan & another] has submitted that the trial should be fair. Justice may not only be done, but it should seem to have been done. For fair trial and fair justice, it is necessary that Public Prosecutor who is conducting the prosecution case should also be fair, impartial and just. It is fundamental right of accused to have fair trial. As in the present case, the Prosecutor is related to one of the witnesses of the prosecution and he had councelled in the

matrimonial dispute of the parties, the Public Prosecutor herein will not conduct the matter fair enough to the accused and the apprehension of the applicant is justified and therefore to secure the ends of justice, in view (2001) 89 SCC 570 - Dinesh Joshi's case, this court should exercise powers under section 482 of Criminal Procedure code directing Public Prosecutor to recuse himself from the said matter and appoint another Public Prosecutor to conduct the said matter.

8] As against this the learned A. P.P. Shri Ahirkar for State relying on AIR 1989 SC Supreme Court 1510 [Rajender Kumar Jain ..vs. Manohar Lal] and AIR 1967 Supreme Court 1214 [State of Punjab ..vs.. Surjit Singh and another] contended that the accused has no right to ask the change of the Public Prosecutor. According to him, it is the choice of the state as to who should conduct the case on behalf of the prosecution. That choice can not be interfered with by the accused, in fact he has no locus to challenge the appointment of Public Prosecutor for his case. On facts he has contended that the apprehension of the applicant came on the floor only after about 1 ½ years when this Public Prosecutor started conducting the matter. In fact he had to appear in this case because at the relevant time Shri Munghate was indisposed and

therefore, he came in the said Sessions Trial for conducting the said matter and later on he continued. As regards the relationship with the prosecution witnesses, through the affidavit of Shri Ambatkar himself, respondent - state has contended that Public Prosecutor Shri Ambatkar never councIled the applicant and deceased in any manner including their matrimonial dispute and only prosecution witness Dr. Makde is distant relative of Shri Ambatkar. He has specifically stated on affidavit that Public Prosecutor Ambatkar never met deceased at his own or never had any occasion to meet the deceased or the present applicant at any point of time. With these contentions, learned A.P.P. contended that Public Prosecutor - Ambatkar can not be asked to withdraw from the case and this court can not direct the government to appoint another Public Prosecutor in his place for conducting that matter.

9] In order to appreciate the rival contentions of the parties, the observations of the Apex Court in the cases referred by the learned counsel for the applicant needs to be seen.

10] In (1987)1 SCC 288 [Sheonandan Paswan's case] the Apex Court has observed:

“The Public Prosecutor is the counsel for the Government for conducting prosecution on behalf of the State Government or the Central Government, as the case may be. He is an officer and like every advocate practicing before court, he also owes an obligation to the court to be fair and just; he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost. He must present the case on behalf of the prosecution fairly and objectively. He is bound to assist the court with his fairly considered view and the fair exercise of his judgment.

A Public Prosecutor is is not a persecutor. He is the representative not of any ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the land the twofold aim of which is that guilt shall not escape or innocent suffer. He should prosecute with earnestness and vigor. it is as much his duty to refrain from improper methods

calculated to produce a wrongful conviction as it is to use every legitimate one to bring about a just one."

11] In (2004)4 SCC 158 [Zahira's case] the Apex Court has observed:

"Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm, Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

12] In (2004) 3 SCC 767 [K. Anbazhagan's case] the Apex Court has held:

"Free and fair trial is sine qua non of Article 21 of the Constitution. it is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the

petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

13] It is necessary to bear in mind, in Zahira's case [Best Bakery Case] which was a unique case, the Apex Court had found that Public Prosecutor was not acting befitting to his duties. He was in a way supporting the accused and therefore, the Apex Court had directed to appoint a Public Prosecutor for the unusual extraordinary factors which were noted in the said case.

14] In Sheonandan Paswan's case, the observations were regarding Public Prosecutor to the effect that he owes an obligation to the court to be fair and just. He was not expected to introduce any personal interest in the prosecution nor was expected to anxious to secure conviction at any cost. It will be thus seen that duty is cast upon the Public Prosecutor to be fair and act in the just manner, while conducting the prosecution case. Needless to say that it is for trial Court to see that he conducts trial in a fair way.

15] In the present case, there is only apprehension of

the applicant. Merely because the Public Prosecutor is related to one of the witnesses, that too by distant relation that fact by itself will not dis-entitle the Public Prosecutor from conducting the case. Concerned P.P. - Shri Ambatkar has specifically denied on affidavit all the contentions raised by the applicant. There is absolutely no further material on record to show that he is persecuting the applicant or taking extraordinary interest in the prosecution case, in such a way that it would defeat the object of fair trial and fair justice. There are no other substantiated allegations of any other type like corruption, leading false evidence etc. On facts it is difficult to hold that Shri Ambatkar Public Prosecutor has so far conducted the prosecution case in such a way that it was detrimental to the interest of the accused in extraordinary way. It can not be lost sight of the fact that the Public Prosecutor has to work; while conducting the prosecution case under the control of the Presiding Judge of the Court. Further anything he does which is contrary to the principles of law or contrary to fair justice and fair trial, the Presiding Judge is entitled and bound take note of it and take suitable action. In the present case, learned Trial Judge has not found any thing, what is prejudicial to the fair trial of the accused. In fact he has observed that the court is there to protect the interest of both the parties. He has also

observed merely because some of the witnesses are known to the learned Public Prosecutor, it can not be said that he will be influencing the witnesses. I do not think, on facts of the case, that his observations are incorrect.

16] Learned counsel for the respondent has relied on the principles led down in AIR 1967 SC 1214 [State of Punjab ..vs.. Surjit Singh and another], wherein it has been observed in paragraph 31 thus:

> "31-The reasonable interpretation to be placed upon S. 494, in our opinion, is that it is only the Public Prosecutor, who is in charge of a particular case and is actually conducting the prosecution that can file an application under that section, seeking permission to withdraw fro the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution, under S. 494 of the Code."

17] In AIR 1980 SC 1510 - Rajendra Kumar's Case the Apex Court has observed in paragraph 13 and 13-A thus:

> "13-Thus, from the precedents of this court; we

gather

1-Under the Scheme of the Code prosecution of an offencer for a serious offence is primarily the responsibility of the Executive.

2-The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3-The discretion to withdraw from the prosecution is that the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

4-The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

5-The Public Prosecutor may withdraw from the prosecution not merely on the ground of a paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammany Hall enterprises.

6-The Public Prosecutor is an officer of the court and responsible to the court.

7-The court performs a supervisory function in granting its consent to the withdrawal.

8-The Court's duty is not to re appreciate the grounds

which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous consideration. The Court has a special duty in this regards as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

13-A We may add, it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of S.321, Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case."

Both the cases which are relied upon by the learned A.P.P.

for the State are on the point of the hatmet importance of duty cast on the Public Prosecutor while withdrawing from the prosecution under section 321 of Cr.P.C., they are not on the point of misconducting the prosecution case by the Public Prosecutor. In my opinion, the ratios of these cases are not at all attracted in the present case.

18] As stated above, the learned counsel for the applicant has relied on (2001) 8 SCC 570 Dinesh's case which lays down the manner in which powers under section 482 are to be exercised by the High Court. Paragraph 6 of the same reads thus:

> “6-Section 482 of the Code of Criminal Procedure Code confers upn the High Court inherent powers to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of process of any court or otherwise to secure the ends of justice. it is a well-established principle of law that every court has inherent power to act ex-debito justitiae to do that real and substantial justice for the administration of which alone it extes or to prevent abuse of process of the court. The principle embodied in the section is based upon the maxim : quando lex aliquid alicui concedit, concedere videtur et id sine qua res ipsae esee non potest i.e. when the law gives

anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extra ordinary powers conferred upon the High Court under this section are however required to be reserved as far as possible, for extraordinary cases."

19] It is apparent from the above discussion that on facts it is difficult to hold that the Public Prosecutor in the present case is conducting the prosecution case in such a manner that it would hit the concept of fair trial and fair justice. Something more was required for coming to this conclusion. In absence of the same on record, extraordinary powers under section 482 Cr.P.C. in my opinion can not be exercised.

Therefore, this application is liable to be rejected. It is rejected.

JUDGE

smp.